

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA08-221

IH SERVICES, INC. and LIBERTY
MUTUAL INSURANCE CO.,
APPELLANTS

V.

CYNTHIA PERRY,
APPELLEE

Opinion Delivered 17 SEPTEMBER 2008

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F606947]

AFFIRMED

D.P. MARSHALL JR., Judge

The question in this workers' compensation case is whether substantial evidence supports the Commission's decision that Cynthia Perry's treatment with Dr. Chakales was reasonable, necessary, and related to her knee injury. *Fayetteville School Dist. v. Kunzelman*, 93 Ark. App. 160, 161–64, 217 S.W.3d 149, 151–53 (2005). It does. Her first two orthopedic surgeons concluded that she only sprained her knee; but her third surgeon—Dr. Chakales—suspected more damage, and his surgery proved him right.

While employed by IH Services as a janitor, Perry slipped in some water in a bathroom that she was cleaning. She almost fell. Catching herself on the wall, she twisted her right knee. Perry immediately reported the injury to her supervisor and was taken to a family practice physician. He examined Perry and referred her to Dr. Johnson, an orthopedic surgeon. Dr. Johnson ordered an MRI of Perry's knee and

sent her to Dr. Pearce, also an orthopedic surgeon. Finding only mild chondromalacia (irritation of the cartilage under the kneecap) and not seeing any tears on the MRI, Dr. Pearce diagnosed Perry with a right knee sprain. He confined Perry to a sitting job for four weeks. Then, though Perry made continued complaints of knee pain, he released her to return to her regular job duties. Through the date of Perry's release from Dr. Pearce's care, IH Services accepted Perry's claim as compensable and paid temporary total and medical benefits.

Immediately after being released by Dr. Pearce, Perry sought and got a change of physician to Dr. Chakales, another orthopedic surgeon. He diagnosed Perry with "possible internal derangement . . . with chondromalacia" and lateral subluxation of the right patella—the result of an unstable kneecap that does not track properly. He then ordered another MRI of her knee. Perry testified that he told her this MRI was "inconclusive." Dr. Chakales nonetheless recommended and eventually performed knee surgery, which revealed (among other things) a "large bucket-handle tear type of the lateral meniscus with flapping[.]" Even though Perry still had problems with her knee after surgery, she testified that her knee had "improved some." IH Services paid for Perry's initial visit to Dr. Chakales, but refused to pay for any of her later treatment.

The ALJ determined that Dr. Chakales's treatment, including the surgery, was reasonable, necessary, and related to her compensable knee injury. Ark. Code Ann.

§ 11-9-508(a) (Supp. 2007). The ALJ also granted Perry additional temporary total disability from July 26, 2006 through a yet-to-be-determined date. The Commission affirmed and adopted the ALJ's decision by a divided vote; Commissioner McKinney dissented without opinion.

On appeal, IH Services argues that Perry's surgery was unnecessary because neither Dr. Johnson nor Dr. Pearce saw a need for it. IH Services also contends that the MRI performed by Dr. Chakales, like the one performed by Dr. Pearce, failed to reveal a definite tear in Perry's knee and that Dr. Chakales's decision to perform surgery was unwarranted. The employer notes that Perry's lack of significant improvement after surgery—a factor that can be considered—also shows that the surgery was both unreasonable and unnecessary. Last, IH Services argues that Dr. Chakales's decision to perform surgery was based largely on Perry's complaints of pain, which were unreasonable and unsupported by the objective medical findings.

Guided by our settled standard of review, we affirm the award of benefits. Perry had never experienced problems with her right knee. After her slip in the bathroom, however, Perry said that her knee hurt almost all the time. Both Dr. Pearce's and Dr. Chakales's medical records so noted. These subjective complaints alone did not establish compensability. Ark. Code Ann. § 11-9-102(16)(A)(ii)(a) (Supp. 2007). The results of the second inconclusive MRI led Dr. Chakales to suspect that Perry's injuries were worse than a sprain and that she might have a tear in her knee. This was an

educated guess. The surgically revealed tear in Perry's knee satisfied the statute's objective medical-findings mandate. *Cross v. Magnolia Hosp. Reciprocal Group of America*, 82 Ark. App. 406, 408, 109 S.W.3d 145, 147 (2003); see also *Wal-Mart Stores, Inc. v. VanWagner*, 63 Ark. App. 235, 238, 977 S.W.2d 487, 488 (1998). Although Perry confirmed that she still had some pain and problems after the surgery, she also testified that her knee had improved. This improvement weighs for compensability. *Winslow v. D & B Mechanical Contractors*, 69 Ark. App. 285, 288, 13 S.W.3d 180, 182 (2000). Substantial evidence therefore supports the Commission's decision. *Fayetteville School Dist.*, 93 Ark. App. at 161–64, 217 S.W.3d at 151–53.

There is one loose end. In one of its argument headings, IH Services also challenges the Commission's award of additional temporary total disability benefits. The employer makes no argument, however, about why this award was erroneous. It has therefore abandoned the point. *Estacuy v. State*, 94 Ark. App. 183, 188–89, 228 S.W.3d 567, 571–72 (2006).

Affirmed.

PITTMAN, C.J., agrees.

HEFFLEY, J., concurs.

HEFFLEY, J., concurring. I am in full agreement with our decision to affirm the Commission's decision because the standard of review requires us to do so when there is substantial evidence supporting the Commission's decision. *Martin Charcoal, Inc. v. Britt*, ____

Ark. App. ___, ___ S.W.3d ___ (May 14, 2008). As part of the standard of review, we recognize that it is the Commission's function to determine the credibility of the witnesses and the weight to be given their testimony, and that when the medical evidence is conflicting, the resolution of that conflict is a question for the Commission. *Owens Planting Co. v. Graham*, ___ Ark. App. ___, ___ S.W.3d ___ (May 21, 2008).

Despite contrary views expressed by the other physicians who treated appellant, the Commission chose to believe the report of Dr. Chakales. Although this strains credulity, I am bound by that credibility determination, even though I may have reached a contrary decision in this matter.